

MEMORANDUM

TO: Alex Thrower, Esq., Blue Ribbon Commission Staff

CC: Mr. John Kotek and Mr. Thomas Cotton

FROM: Van Ness Feldman, PC

DATE: December 20, 2010

RE: Legal Background and Questions Concerning the Federal Government's Contractual Obligations Under the "Standard Contracts" with "Utilities"

This memorandum addresses four major issues and a variety of sub-issues. The four major issues are:

1. Provisions of the Current Standard Contracts Between the Department of Energy and Utilities.
2. Status of Lawsuits Involving the Standard Contracts.
3. On-Site Storage.
4. To What Extent Do Current Contracts Constrain Future Changes to the Fee Structure and the Uses of the Nuclear Waste Fund?

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Executive Summary

This Memorandum analyzes issues related to the Standard Contract between the U.S. Department of Energy (“DOE”) and the “utilities.” Beginning with a discussion of specific provisions of the Standard Contract, this Memorandum then analyzes the status of lawsuits involving the Standard Contract, reviews issues related to on-site storage of spent fuel and HLW, and assesses the prospects for modifying the current waste-disposal regime through Federal legislation or amendments to the Standard Contract.

The Standard Contract provides for an “acceptance priority ranking” that gives priority to the “oldest fuel first.” In addition to allowing exceptions from the acceptance priority ranking for “emergencies” and “shut down” reactors, the Standard Contract authorizes DOE to use its discretion in approving acceptance schedules provided by utilities. Under the terms of the Contract, a utility may exchange its position in the acceptance priority ranking with another utility, subject to DOE’s “sole discretion” to approve such an exchange. While no utility has yet exercised its right of exchange due to the on-going unavailability of a permanent repository, utilities would be expected to do so once DOE begins performance under the Contract.

DOE is required to accept all spent fuel and HLW, even if classified as “non-standard.” However, utilities must “obtain delivery and procedure confirmation from DOE prior to delivery,” which might result in an adjustment of the position of the spent fuel in the acceptance priority ranking. Similarly, DOE may depart from the acceptance priority ranking through its authority to grant priority to spent fuel and HLW from “shut down” reactors, although to date DOE has declined to do so.

The Standard Contract requires utilities to pay to DOE a uniform fee for disposal of spent fuel and HLW, beginning on April 7, 1983. The fee applies universally to all utilities and may not be adjusted by DOE with respect to an individual utility. For spent fuel produced prior to that date, utilities are required to make a one-time payment that, under the payment options provided in the Standard Contract, may be deferred until as late as “anytime prior to the first delivery” of spent fuel or HLW to DOE. The Nuclear Waste Policy Act (“NWPA”) requires DOE to review the amount of the uniform fee on an annual basis to ensure that it recovers the full costs of disposal. Two recent lawsuits, filed by the National Association of Regulatory Utility Commissioners (“NARUC”) and the Nuclear Energy Institute (“NEI”) that challenged DOE’s compliance with this requirement in light of DOE’s decision to terminate the Yucca Mountain Project were dismissed by the D.C. Circuit as unripe and moot. However, in the same orders, the D.C. Circuit stated that NARUC and NEI might be able to challenge DOE’s latest assessment of the adequacy of the Nuclear Waste Fund in light of DOE’s decision to terminate the Yucca Mountain Project.

The Standard Contract has been the subject of extensive litigation. All cases to date have found DOE to be in partial breach – rather than full breach – of the Standard Contract, and this is unlikely to change for the foreseeable future. In *Alabama Power*, the Eleventh Circuit found that the NWPA limits the use of the Nuclear Waste Fund to waste disposal activities and, therefore, DOE is prohibited from using the Fund to pay

for on-site storage costs. Also, the Eleventh Circuit held that damage claims resulting from lawsuits brought under the Standard Contract may not be paid from the Fund. Damages resulting from DOE's partial breach of the Standard Contract are calculated by comparing the plaintiff utility's costs to mitigate DOE's partial breach to the costs the utility would have incurred had DOE fully performed under the Standard Contract.

Once DOE begins performance under the Standard Contract, DOE should incur no further damages related to accepted fuel as of the date of acceptance. The courts have found that the Standard Contract's equitable adjustments provision in the "avoidable delays" subsection is inapplicable to DOE's partial breach. As a result, even after DOE commences performance under the Standard Contract, this provision would apply, if at all, only to routine delays, *i.e.*, those that are related to an individual utility's waste delivery schedule.

DOE could possibly achieve partial performance under the Standard Contract, and thereby avoid additional liability, by accepting title at reactor sites and continuing on-site storage of the spent fuel, but only if DOE were to also assume all costs of on-site storage. Furthermore, DOE can only achieve full performance by taking title to the spent fuel, removing it from the utilities' sites, and disposing of it in a manner that is fully funded by DOE. DOE could be permitted to pay for continued on-site storage through a legislative amendment of the NWPA that explicitly provides for "on-site" storage as a permissible Nuclear Waste Fund expenditure. Without such an amendment, on-site storage could not be paid for using the Fund.

Despite the ability of Congress to amend the NWPA to provide for additional uses of the Fund, the Standard Contracts with utilities are contractually binding on DOE. Thus, in the event that Congress amends the NWPA to provide for alternate uses of the Fund, current contract holders might sue to recover any Fund amounts expended on such uses. The utilities' likelihood of success in those circumstances is unclear.

DOE could possibly negotiate with a utility to amend the Standard Contract to allow for refunds of payments to the Fund for costs incurred by the utility to reduce DOE's disposal costs. Although it is not clear that costs incurred by a utility to convert spent fuel to HLW would be considered "treatment" of the spent fuel and therefore an allowable use of the Fund, a determination by DOE that such conversion costs are an acceptable use of the Fund, according to the requirements set forth in NWPA Section 136, would likely be upheld as reasonable.

Finally, legislation to amend the NWPA to allow credits to utilities for costs incurred to convert spent fuel to HLW would likely not be successfully challenged by other utilities, especially if doing so reduced DOE's disposal costs and the credits did not exceed DOE's cost savings. It is unclear whether utilities would have a viable legal objection to legislation amending the NWPA to allow the Fund to be used to provide credits for the costs of on-site storage, because the result would depend on the program design adopted used by Congress to effect such an amendment.

ISSUE 1. PROVISIONS OF THE CURRENT STANDARD CONTRACTS BETWEEN THE DEPARTMENT OF ENERGY (“DOE”) AND THE UTILITIES.¹

a) Oldest fuel first priority and its meaning (i.e., it is the basis for allocating acceptance rights, but utilities do not have to deliver oldest first.)

Pursuant to the Nuclear Waste Policy Act of 1982, as amended (“NWP”) and the Standard Contracts, DOE maintains an “acceptance priority ranking” (“ranking”). The ranking is governed by certain provisions in the Standard Contracts, although those provisions still appear to provide DOE with discretion in a number of respects, as we discuss *infra*. The most-pertinent priority ranking-provisions of the Standard Contract are as follows:

Article IV, Section B.5(a) (part of a Section entitled “*DOE Responsibilities*”):

Beginning on April 1, 1991, DOE shall issue an annual acceptance priority ranking for receipt of spent fuel and/or HLW at the DOE repository. This priority ranking shall be based on the age of SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. The oldest fuel or waste will have the highest priority for acceptance, except as provided in paragraphs B and D of Article V and paragraph B.3 of Article VI hereof.

Art. V, Sections B and D:

B. *Delivery Commitment Schedule*

1. Delivery commitment schedule(s), in the form set forth in appendix C annexed hereto and made a part hereof, for delivery of SNF and/or HLW shall be furnished to DOE by Purchaser. After DOE has issued its proposed acceptance priority ranking, as described in paragraph B.5 of Article IV hereof, beginning January 1, 1992 the Purchaser shall submit to DOE the delivery commitment schedule(s) which shall identify all SNF

¹ We use the term “Standard Contract” to refer to any of the individual contracts between DOE and a “utility” for the commercial reactors now operating (and not the addendum to that Standard Contract drafted by DOE for the new commercial reactors for which licenses are being sought at the Nuclear Regulatory Commission (“NRC”). We use the term “utilities” herein for convenience, even though some NRC commercial reactor licenses are now merchant generators and not traditional electric utilities, because “utilities” is the term in common usage, rather than “generators and owners of high-level radioactive waste and spent nuclear fuel” as that phrase is used in Section 111 of the NWP.

and/or HLW the Purchaser wishes to deliver to DOE beginning sixty-three (63) months thereafter. DOE shall approve or disapprove such schedules within three (3) months after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and request a revised schedule from the Purchaser, to be submitted to DOE within thirty (30) days after receipt of DOE's notice of disapproval.

2. DOE shall approve or disapprove such revised schedule(s) within sixty (60) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval and shall submit its proposed schedule(s). If these are not acceptable to the Purchaser, the parties shall promptly seek to negotiate mutually acceptable schedule(s). Purchaser shall have the right to adjust the quantities of SNF and/or HLW plus or minus (\pm) twenty percent (20%), and the delivery schedule up to two (2) months, until the submission of the final delivery schedule.²

D. Emergency Deliveries

Emergency deliveries of SNF and/or HLW may be accepted by DOE before the date provided in the delivery commitment schedule upon prior written approval by DOE.³

Art. VI, Section B.1 states:

"B. Acceptance Procedures

"1. Acceptance Priority Ranking.

Delivery commitment schedules for SNF and/or HLW may require the disposal of more material than the annual capacity of the DOE disposal facility (or facilities) can accommodate. The following acceptance priority ranking will be utilized:

(a) Except as may be provided for in subparagraph (b) below and Article V.D. of this contract, acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor. DOE will first accept from Purchaser the oldest SNF and/or HLW for disposal in the DOE facility, except as otherwise provided for in paragraphs B and D of Article V.

(b) Notwithstanding the age of the SNF and/or HLW, priority may be

² Art. V, Section B *Delivery Commitment Schedule*.

³ Art. V, Section D *Emergency Deliveries*.

accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.

Accordingly, the Standard Contract makes clear that there is an exception for “emergencies,” and “shut down” reactors. Moreover, DOE has the right to approve or disapprove an acceptance schedule provided by a utility, which may include an offer to “exchange” places in the fuel acceptance queue with another utility (see discussion *infra*). Presumably, DOE cannot arbitrarily disapprove such a schedule, but apparently for the reasons stated, DOE does not regard the ranking as creating fixed contractual rights. At the same time, it appears that the utilities do regard their position in the ranking as a contractual right.⁴ This issue has not been tested, so far as we know, because there has been no acceptance by DOE of commercial spent fuel (other than in a few special circumstances, such as for Three Mile Island- Unit 2 and Fort St. Vrain, where the acceptance by DOE did not raise issues with the ranking).

However, damages have been asserted and awarded in actions brought against DOE in the U.S. Court of Federal Claims, based on the utility’s acceptance ranking under DOE’s 1987 “Acceptance Capacity Report.”⁵ It appears that, with the exceptions of (a) emergencies and (b) possible acceptance of spent fuel or HLW “shut down” reactors, DOE is obligated to establish the ranking according to the “oldest fuel first” criteria, and that the failure to do so would give rise to a contractual claim for damages.⁶ We base this conclusion on the language in Article VI.B.1(a) that “acceptance priority shall be based upon the age of the SNF and/or HLW as calculated from the date of discharge of such material from the civilian nuclear power reactor,” except for emergencies and priority given to spent fuel and HLW from shut-down reactors.

b) Ability to trade acceptance rights. Court decisions related to the status of these rights.

Based on Mr. Kraft of NEI’s August 19, 2010 presentation, the utilities generally regard their position in the ranking as a fixed contractual right under Art. VI.B.1(a) (quoted and discussed *supra*) and Art. V, Section E of the Standard Contract, which states:

⁴ See the August 19, 2010 presentation of Mr. Steven Kraft of NEI, before the BRC’s Transportation and Storage Subcommittee.

⁵ *E.g., Pacific Gas & Electric Co. v. United States*, 536 F.3d 1282, 1292 (Fed. Cir. 2008).

⁶ There are other exceptions utilities may invoke that could also alter the ranking. Under the Standard Contract, SNF/HLW may not necessarily be delivered to DOE according to the OFF ranking due to: 1) the exchange provisions of the Standard Contract (discussed *infra*), and 2) the discretion granted to utilities to determine which fuel is delivered to DOE under Standard Contract Art. V.E, quoted *infra*.

E. Exchanges

Purchaser shall have the right to determine which SNF and/or HLW is delivered to DOE; *provided, however*, that Purchaser shall comply with the requirements of this contract. Purchaser shall have the right to exchange approved delivery commitment schedules with parties to other contracts with DOE for disposal of SNF and/or HLW; *provided, however*, that DOE shall, in advance, have the right to approve or disapprove, in its sole discretion, any such exchanges. Not less than six (6) months prior to the delivery date specified in the Purchaser's approved delivery commitment schedule, the Purchaser shall submit to DOE an exchange request, which states the priority rankings of both the Purchaser hereunder and any other Purchaser with whom the exchange of approved delivery commitment schedules is proposed. DOE shall approve or disapprove the proposed exchange within thirty (30) days after receipt. In the event of disapproval, DOE shall advise the Purchaser in writing of the reasons for such disapproval.

Accordingly, utilities have a contractual right to exchange their position in the acceptance ranking, subject to DOE's right, "in its sole discretion," to "approve or disapprove...any such exchanges." Generally, if a matter is committed to agency discretion by law, it is considered essentially unreviewable by the courts under the Administrative Procedure Act. Here, the discretion is asserted as a matter of contract, not statute, and DOE's action can be reviewed under an "abuse of discretion" standard. For example, in *Pacific Gas & Electric v. United States*, 536 F.3d at 1292, despite DOE's claim to discretion, the Court held that PG&E reasonably would have expected to have its older fuel accepted by DOE in accordance with the 1987 Annual Capacity Report, and its damages were to be calculated in accordance with that expectation.

In his August 19, 2010 presentation, Mr. Kraft of NEI stated that, to date, utilities universally have been unwilling to exchange their positions in the ranking. Apparently, according to Mr. Kraft, this circumstance results more from the fact that DOE remains in partial breach of the Standard Contract than from a disinclination on the part of the utilities to exercise their rights under the exchange provision. In fact, it appears likely, assuming DOE at some point in the future begins performance under the Contract, that the utilities will thereafter begin to exercise their rights under the exchange provision and that an exchange market will develop. This prediction stems from both the treatment of the exchange provision in Standard Contract litigation and the fact that the exchange provision was incorporated into the Standard Contract at the utilities' behest.⁷ When calculating damages under the Standard Contract, the courts have consistently

⁷ *Yankee Atomic Power Co. v. United States*, 2010 U.S. Claims LEXIS 672 at 16-17 (2010).

determined that utilities would have exercised their right of exchange had DOE not breached its duties under the Contract, particularly in instances where a utility would have had a strong financial incentive to procure such an exchange.⁸ DOE itself has stated its belief “that once the Federal waste management system is operational, the exchange provision will be exercised by the Purchasers as originally anticipated.”⁹

Assuming that an “emergency” or that spent fuel or HLW from a shutdown reactor is not involved, DOE, based on its position in *Pacific Gas & Electric*, still takes the position that it has flexibility with respect to the ranking and that it may, therefore, deviate from it as a matter of its discretion. We would anticipate a dispute on that point from those utilities in a superior position in the ranking, and, as stated above, we believe the utilities have a contractual basis for their position.

c) Treatment of canistered fuel as non-standard fuel and implications for acceptance priorities.

The Standard Contract defines “Standard Fuel” as any SNF that meets a specific set of prescriptions related to dimensions, components, cooling time, reactor type, and assembly status.¹⁰ All SNF that does not meet any one of the detailed specifications is considered non-standard. Art. VI, Section A.2(b) of the Standard Contract (as part of a Section entitled “*Criteria for Disposal*” and a subsection entitled “*Procedures*”) defines DOE’s obligations with regard to disposal of non-standard fuel:

DOE's obligation for disposing of SNF under this contract also extends to other than standard fuel; however, for any SNF which has been designated by the Purchaser as other than standard fuel, as that term is defined in appendix E, the Purchaser shall obtain delivery and procedure confirmation from DOE prior to delivery. DOE shall advise Purchaser within sixty (60) days after receipt of such confirmation request as to the technical feasibility of disposing of such fuel on the currently agreed to schedule and any schedule adjustment for such services.

As provided in the last sentence of Art. VI, Section A.2(b), the Standard Contract clearly contemplates that the use of non-standard fuel configurations may lead to adjustments

⁸ See, e.g., *Yankee Atomic Power Co.*, 2010 U.S. Claims LEXIS at 18-28; *PG & E v. US.*, 92 Fed. Cl. 175, 184-85 (2010); *Tenn. Valley Authority v. United States*, 69 Fed. Cl. 515, 533 (Fed. Cl. 2006).

⁹ See *Yankee Atomic Power Co.*, 2010 U.S. Claims LEXIS at 54 (quoting a September 28, 1995 letter from OCRWM Director Daniel A. Dreyfus to Dr. Andrew C. Kadak, President and Chief Executive Officer of Yankee Atomic).

¹⁰ Standard Contract App. E.A.1.a.

of the delivery schedule.¹¹ However, the exact treatment of canistered and other non-standard fuels within the acceptance priority ranking remains unclear and may, therefore, have to be resolved case-by-case.

Non-standard fuel in general, and canistered fuel in particular, has received limited attention in the Standard Contract litigation. Specifically, the issue has been directly addressed in only two cases. In the first case, the Court addressed the treatment of an entire fuel system (including the spent fuel and the containers) that was considered to be non-standard. With respect to the canistered fuel classified as non-standard, DOE made representations that, following certification by the NRC of the transport-storage system that included the non-standard fuel, DOE “would be willing to initiate the appropriate actions to include such a system as an acceptable waste form under the terms of the Standard Contract.”¹² There, DOE’s representations assuaged the utility’s concerns over whether DOE would in fact accept the non-standard fuel but concerns remained over whether the classification of the fuel as “non-standard” could impact the timing of acceptance by DOE.¹³

In the second case, the Court of Federal Claims addressed the distinct issue of how DOE would treat for scheduling purposes non-standard fuel assemblies contained within a standard “DOE-approved” containment system. The Court noted that “at least as late as September 13, 1985, DOE’s intent was that ‘all currently designed nuclear fuel, including that falling outside the maximum physical dimensions specified in Appendix E [of the Standard Contract], will be subject to the same scheduling procedures,’ and that ‘[f]ailed fuel canned in a container provided by or approved by [DOE] also will be subject to the same scheduling procedures as other spent fuel.’”¹⁴

¹¹ *Pacific Gas & Electric Co. v. United States*, 73 Fed. Cl. 333, 351-52 (Fed. Cl. 2006) (recognizing that “[a] change or delay in the schedule for disposing of other than standard fuel (*i.e.*, ‘non-standard’ or ‘failed’ fuel) because of the ‘technical feasibility’ of doing so may occur, for example, where the other than standard fuel requires ‘special handling.’” See 10 C.F.R. § 961.11, Art. VI.A.2(b), App. E).

¹² *Sacramento Mun. Util. Dist. v. United States*, 70 Fed. Cl. 332, 347 (Fed. Cl. 2006) (internal citation omitted).

¹³ *Id.* at 347-48.

¹⁴ *Pacific Gas & Electric Co.*, 73 Fed. Cl. at 351-52 (citing a September 13, 1985 letter from Robert H. Bauer, Associate Director for Resource Management, Office of Civilian Radioactive Waste Management to James B. Hall, Director, Utility Nuclear Waste Management Group at 1).

Accordingly, based on past treatment by DOE, it would appear that failed fuel in an NRC-certified container is likely to be treated by DOE in the same manner as standard fuel for scheduling and disposal procedures as is other spent fuel.

- d) Ability of DOE to give priority to shutdown reactors (from the Van Ness Feldman “Federal Commitments” report). Any court decisions/opinions related to the status of this as a right.

Art. VI, Section B.1. (b) of the Standard Contract (in a Section entitled “*Acceptance Procedures*” and a subsection entitled “*Acceptance Priority Ranking*”) states that “Notwithstanding the age of the SNF and/or HLW, priority may be accorded any SNF and/or HLW removed from a civilian nuclear power reactor that has reached the end of its useful life or has been shut down permanently for whatever reason.” We construe this provision to give DOE discretion to depart from the acceptance priority ranking to expedite the date on which it accepts spent fuel or HLW from a shutdown reactor. Agency discretion, however, may not be exercised in an arbitrary manner.¹⁵

At least one court case has construed this provision as bestowing a right to have spent fuel accepted as of the date DOE had indicated in the ranking where the spent fuel was from a utility (Pacific Gas & Electric Company) whose reactor (Humboldt Bay) had ceased operation.¹⁶ The shutdown provision has been directly raised in at least two instances, but in each case the Court of Federal Claims declined to reach the issues relevant to the shutdown priority provision.¹⁷ In *PG&E*, PG&E argued that, had DOE performed its duties under the Standard Contract, PG&E would have sought and received DOE’s permission to take advantage of the shutdown priority provisions.¹⁸ Outside the context of litigation, as recently as a 2008 interim storage report, DOE has been asked to permit spent fuel or HLW from a shutdown reactor to be moved up in the ranking, but it has consistently declined to do so, given the potential implications for operating reactors.

¹⁵ *E.g., Motor Veh. Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁶ *PG&E v. United States*, 536 F.3d 1282, 1292 (Fed. Cir. 2008)(“ For these reasons, this court concludes that the Standard Contract required DOE to accept SNF/HLW in accordance with the 1987 ACR [Annual Capacity Report] process. On remand, the Court of Federal Claims will have the opportunity to calculate the damages owed to PG&E for DOE's partial breach of the Standard Contract on this basis.”).

¹⁷ *PG&E*, 92 Fed. Cl. at 185 n.8 (Fed. Cl. 2010), *Dairyland Power Coop. v. United States*, 90 Fed. Cl. 615, 635 n.24 (Fed. Cl. 2009) (shutdown provision not adjudicated because evidence showed Dairyland Power would have exercised right to exchange acceptance provision).

¹⁸ *PG&E*, 92 Fed. Cl. at 185 n.8.

e) Uniform fee applied to all utilities.

Section 302(a)(2)¹⁹ of the NWPA, Article VIII.A.1 of the Standard Contract,²⁰ and court decisions construing the Standard Contract²¹ all contemplate a uniform fee applicable to all utilities (except for the one-time payments due for spent fuel produced before 1983; see *infra*). In particular, the Eleventh Circuit has found that the fee is “universal” and that DOE does not have the authority to adjust the fee with respect to any individual utility.²²

Despite the requirement of a uniform fee, there may be an argument available for refunds. In response to Issue 4, we do address the issue of refunds, and describe an example of a utility that incurs costs to reduce DOE’s disposal costs (by converting spent fuel to HLW), and conclude that refund for such conversion, limited to DOE’s cost savings (so as not to cause other utilities’ NWF fees to increase) may be permissible.

f) One-time payments for spent fuel produced before 1983; implications for utilities that opted to pay upon first delivery of fuel to DOE (i.e., some utilities will have to pay a very large one-time payment sum before they can begin to deliver a single fuel assembly to DOE).

The NWPA²³ and the Standard Contract²⁴ call for utilities to pay a one-time fee for disposal of spent fuel discharged from reactors prior to April 7, 1983 (as well as for a prorated share of in-core fuel as of that date). The options provided in the Standard Contract allowed utilities to choose to defer payment of the one-time fee until as late as “anytime prior to the first delivery” of SNF or HLW to DOE.²⁵ It does appear that,

¹⁹ Section 302(a)(2) of the NWPA states: “For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after the date of enactment of the Act, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.”

²⁰ Art. VIII.A.1 of the Standard Contract states: “Effective April 7, 1983, Purchaser shall be charged a fee in the amount of 1.0 mill per kilowatt hour (1M/kWh) electricity generated and sold.”

²¹ Most notably, *Ala. Power Co. v. U.S. Dep’t of Energy*, 307 F.3d 1300, 1313-14 (11th Cir. 2002) held that the NWF could not be used, directly or indirectly, to give a utility credit (against the NWF fee otherwise owed to DOE) for its on-site storage costs.

²² *Id.* at 1316.

²³ 42 U.S.C. § 10222(a)(3).

²⁴ 10 C.F.R. § 961.11, Standard Contract Art. VIII.A.2.

²⁵ Standard Contract Art. VIII.B.2(b)(Option 2).

although some utilities paid previously, other utilities may have to pay a very large one-time payment (including interest) before they can begin to deliver a single fuel assembly to DOE.²⁶ The applicable subsection, Section 302 (a)(3), explains the fee to be imposed:

For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after the date of enactment of this Act, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 123, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c) 126(b).\1\ In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.²⁷

²⁶ *Yankee Atomic Power Co.*, 2010 U.S. Claims LEXIS 672 at 37 (2010) (noting, for example, that both Maine Yankee Atomic Power Company and Yankee Atomic Electric Company opted to defer paying their one-time NWF fees to the DOE because it was “economically advantageous.”). The one-time fee would include interest costs. Under Article VIII of the Standard Contract, utilities that opted for the deferred payment may not prorate that payment over the pre-1983 spent fuel as it is actually delivered to DOE under the contract, rather than in one lump sum before any spent fuel can be delivered.

²⁷ The fee can be adjusted by DOE under Section 302(a)(4) if necessary so that the fees collected allow DOE to “insure full cost recovery.” Note that the Standard Contract states, in Article I.11:

- g) Requirement that the fee be adjusted to ensure full cost recovery (and no more than full cost recovery). Implications of United States Court of Appeals for the Eleventh Circuit, No. 00-16138, Ala. Power Co., et al., v. U. S. Dep't Of Energy, 307 F.3d 1300 (2002) (eliminates one-house veto of fee changes).

The NWPA requires that DOE impose on all utilities that are party to the Standard Contract a uniform fee to cover the costs of DOE's disposal activities. As stated by DOE in the Standard Contract, the NPWA mandates that "all costs associated with the preparation, transportation, and the disposal of [spent fuel and HLW] from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste" ²⁸ The NWPA further mandates that, "[e]ach year, DOE must review the fees collected to ensure that they cover the costs of the listed disposal activities [and i]f necessary to ensure a full cost recovery, DOE may. . . adjust the contract fees." ²⁹

The term *full cost recovery*, means the recoupment by DOE, through Purchaser fees and any interest earned, of all direct costs, indirect costs, and all allocable overhead, consistent with generally accepted accounting principles consistently applied, of providing disposal services and conducting activities authorized by the Nuclear Waste Policy Act of 1982 (Pub. L. 97-425). As used herein, the term cost includes the application of Nuclear Waste Fund moneys for those uses expressly set forth in section 302(d) and (e) of the said Act and all other uses specified in the Act.

Also, Article VIII.A.4 states:

DOE will annually review the adequacy of the fees and adjust the 1M/KWH fee, if necessary, in order to assure full cost recovery by the Government. Any proposed adjustment to the said fee will be transmitted to Congress and shall be effective after a period of ninety (90) days of continuous session has elapsed following receipt of such transmittal unless either House of Congress adopts a resolution disapproving the proposed adjustment. Any adjustment to the 1M/KWH fee under paragraph A.1. of this Article VIII shall be prospective.

In *Ala. Power*, following Supreme Court precedent, the Eleventh Circuit held that the clause "unless either House of Congress adopts a resolution disapproving the proposed adjustment" is unconstitutional. 317 F.3d at 1307-08.

²⁸ Standard Contract, Pmbl.

²⁹ *Yankee Atomic Elec. Co. v. United States*, 42 Fed. Cl. 223, 226 (Fed. Cl. 1998)

DOE's authority to adjust the contract fees was originally subject to Congressional review through statutory language stating that such an adjustment would be effective "after a period of 90 days of continuous session have elapsed following the receipt of [the adjustment by the Congress] unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment."³⁰ However, the "one House veto" was deemed unconstitutional in *Alabama Power Co.*,³¹ and, as a result, any determination by DOE that a fee change is necessary would now take effect directly and automatically.³² Lawsuits challenging the legitimacy of any action that could lead to an increase in the fee are immediately ripe for consideration, and would not have to wait until a fee change actually occurred.

The Obama Administration's determination to terminate the Yucca Mountain Project, and the challenges brought by the National Association of Regulatory Utility Commissioners and the Nuclear Energy Institute in the U.S. Court of Appeals for the D.C. Circuit to the continued determination of DOE to collect a 1 mil/kWh fee for nuclear-generated electricity,³³ suggested that the issue of an adjustment to the fee would be litigated in the D.C. Circuit in the pending litigation. However, on December 13, 2010, the D.C. Circuit dismissed the NARUC and NEI challenges as "unripe," while stating that the two entities might now be able to challenge DOE's latest (*i.e.*, November 2010) assessment of the adequacy of the NWF.³⁴

Even if the NRC upholds the decision of its Atomic Safety and Licensing Board to deny DOE's motion for leave to withdraw its Yucca Mountain Project Application,³⁵ the

(citing 42 U.S.C. § 10222(a)(4)). Note that, as discussed above, language in the NWPFA granting Congressional oversight of DOE's fee adjustments through what it is referred to as a "one house veto" has been found to be unconstitutional.

³⁰ *Id.*

³¹ *Ala. Power*, 307 F.3d at 1307-08.

³² Both Houses of Congress could, of course, enact a resolution with respect to the Secretary's determination and, if the President signed the resolution, overturn or modify the Secretary's determination.

³³ Brief of Petitioner National Association of Regulatory Utility Commissioners and Brief of Joint Petitioners Nuclear Energy Institute, *Nat'l Ass'n of Regulatory Utility Comm'rs, v. United States Dep't of Energy*, No. 10-1074, *et al.* (D.C. Cir.).

³⁴ Judgment, *Nat'l Ass'n of Regulatory Utility Comm'rs, v. United States Dep't of Energy*, No. 10-1074, *et al.* (D.C. Cir. Dec. 13, 2010).

³⁵ Motion to Withdraw of the U.S. Dep't of Energy, *United States Dep't of Energy (High-Level Waste Repository)*, NRC Docket No. 63-001-HLW & ASLBP No. 09-892-HLW-

challenges to DOE's failure to adjust the 1 mil/kWh fee could still continue despite DOE's efforts to terminate the Project. NARUC and NEI presumably will argue, even if the NRC denies DOE's motion for leave to withdraw its Application, that DOE's Project costs have still been reduced so substantially that the fee should be adjusted.

If the Yucca Mountain Project is terminated, it may be untenable for DOE to continue to seek to collect the same fee. Arguably, DOE's costs will have declined substantially because of the elimination of the Yucca Mountain Project and because an alternative repository can not be sited without amending the NWPA.³⁶

ISSUE 2. STATUS OF LAWSUITS INVOLVING THE STANDARD CONTRACTS

a) Partial breach vs. full breach (from Federal commitments report).

All cases to date have held that DOE has committed a partial breach, not a full breach, of the Standard Contract. These decisions have gone so far as to find that the language of the NWPA and the Standard Contract, which vest exclusive responsibility for the disposal of domestic spent fuel and HLW in DOE and require utilities to contract with DOE for such disposal as a condition of licensing, prevents the utilities from alleging a total breach of contract on the current facts.³⁷ Under these holdings, it would

CAB04 (filed March 3, 2010). For further discussion, see Van Ness Feldman's Memorandum "Federal Commitments Regarding Used Fuels and HLW" at Sec. I.C.3.

³⁶ See Section 302(a)(4), 42 U.S.C. § 10222(a)(4) ("The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress.").

³⁷ *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1374 (Fed. Cir. 2005) (finding "Indiana Michigan had no choice but to hold the government to the terms of the Standard Contract while suing for partial breach."); see also *Southern Cal. Edison Co. v. United States*, 93 Fed. Cl. 337, 348 (Fed. Cl. 2010) ("When DOE announced in 1989 that it would not meet the 1998 deadline, then contended that it had no obligation to do so, utilities made plans to handle unexpected quantities of nuclear waste on their own. They did not terminate the Standard Contracts to which they were parties, nor could they have. The utilities' only avenue for relief was to sue the Government for partial breach of contract. The Court of Appeals for the Federal Circuit has noted that Congress "effectively made entry into such [Standard Contracts] mandatory for the utilities[.]" *Maine Yankee*, 225 F.3d at 1337. Congress effectively made exit from such contracts

appear that the likelihood of a holding of full breach is very low for the foreseeable future, regardless of whether the Yucca Mountain Project is terminated.

All cases to date have held that DOE has committed a partial breach, not a full breach, of the Standard Contract. Even if the Yucca Mountain Project is terminated, DOE's position is that it still intends to take the spent fuel, and therefore it is not in full breach. Moreover, the utilities (at least as of now, and most likely for the foreseeable future) do not want a determination of total breach (because that would leave them without any option for disposing of the spent fuel), so they will most certainly continue to claim "partial breach" rather than full breach. Therefore, the likelihood of a holding of full breach is very low, for the foreseeable future.

b) The court decision that disallowed use of the Waste Fund to pay for damages.

The Court in *Ala. Power*, 307 F.3d at 1313-14, held that the Nuclear Waste Fund could only apply to disposal activities. The Court stated:

First, the statute provides that the Secretary "may make expenditures from the Waste Fund . . . only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter." 42 U.S.C. § 10222(d). An expenditure on interim storage is not an act of "disposal." Rather, payments the Department makes for on-site storage is the opposite of "disposing" of the waste.

The Act makes a list of things that might be considered acts of "disposal." [footnote omitted] Although the list is not exhaustive, it is instructive of the kinds of activities that might be characterized as "disposal." The items in the list all have one thing in common: they entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository. None of them encompass the maintenance of the status quo. To be sure, the D.C. Circuit did give broad meaning to the term "dispose" in *Indiana Michigan*, construing the term to mean more than "the emplacement in a repository of spent nuclear fuel with no foreseeable intent of recovery" as the statutory definition of "disposal", 42 U.S.C. § 10101(9), might have one believe. *Indiana Michigan Power Co. v. Dep't of Energy*, 319 U.S. App. D.C. 209, 88 F.3d 1272, 1275 (D.C. Cir. 1996). But the court adhered to the ordinary meaning of that term. *Id.* ("Webster's Third New International Dictionary

impossible for the utilities."); *Ariz. Pub. Serv. Co. v. United States*, 2010 U.S. Claims LEXIS 408, 7-8 (Fed. Cl. 2010). Indeed, as the Federal Circuit has noted, the NWPA precludes the utilities from treating the government's omissions as a total breach, insofar as the DOE may not be discharged from the responsibility to dispose of SNF and HLW. *Ind. Mich.*, 422 F.3d at 1374.

Unabridged 654 (1961) defines [dispose] as meaning, among other things, 'to get rid of; throw away; discard.'). Payments for the purpose of interim storage costs simply are not payments for "disposal." Indeed, the Department itself once disavowed any authority to utilize the NWF to compensate plant owners for additional storage costs at reactor sites caused by the Department's delay. See Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,797 (May 3, 1995).

The Court pointed out that there is a list of things that could be considered disposal activities in the NWPA, viz.:

- (1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored, retrievable storage facility or test and evaluation facility constructed under this chapter;
- (2) the conducting of nongeneric research, development, and demonstration activities under this chapter;
- (3) the administrative cost of the radioactive waste disposal program;
- (4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored, retrievable storage site or to be used [sic: used] in a test and evaluation facility;
- (5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored, retrievable storage site or a test and evaluation facility site and necessary or incident to such repository, monitored, retrievable storage facility or test and evaluation facility; and
- (6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

42 U.S.C. § 10222(d).

- c) Has the acceptance schedule and rate against which to measure damages been settled so it is the same in each case, or is that still being argued?

While a general rule of determination exists, the details of the rule may continue to evolve. In general, to determine the amount of damages in the SNF cases, the courts compare the cost to the plaintiff to mitigate DOE's partial breach with the costs the plaintiff would have incurred had DOE performed under the contract by accepting SNF and HLW according to the appropriate contract schedule (often referred to in the case

law as “non-breach world”).³⁸ The allowable damages are limited to the difference between the two calculations.

For purposes of calculating the costs in the “non-breach world,” the Federal Circuit has mandated that determinations of the hypothetical costs in the “non-breach world” be made using the used fuel and HLW acceptance rates detailed in DOE’s 1987 Annual Capacity Report (“ACR”).³⁹ Although more recent reports are available, the Court found the 1987 report to be the most reliable evidence of what would have occurred in the “non-breach world” because “[a]fter the 1987 Amendments Act, breach became highly likely or inevitable. . . . Later ACS reports became tainted by the impending breach and even impending litigation strategies.” *Id.* Thus, “[t]he 1987 ACR rate, which was derived from DOE’s June 1987 OCRWM Mission Plan Amendment, now controls all SNF damages calculations, at least for the first ten years of performance.”⁴⁰

While this is the general rule for determining acceptance rates in the “non-breach world,” it appears that details of the rule’s application are continuing to evolve. For instance, in at least in one subsequent case, the Court of Federal Claims has slightly modified the process for determining the acceptance schedule. There, the Court replaced the projected reactor discharge data used in the 1987 ACR for the 1985-87 period with actual discharge data for that period that it obtained from DOE’s 2004 Acceptance Priority Ranking.⁴¹ It is unclear if this modified approach will be adopted going forward or if future decisions in the Court of Federal Claims will revert to using the unmodified 1987 ACR to determine used fuel acceptance rates as directed by the Federal Circuit.

- d) What is the effect on liabilities of initiation of performance under the contract by DOE? Once DOE begins performance under the contract (i.e., starts accepting spent fuel), does that allow DOE to begin dealing with further delays under the “equitable adjustments” clause of the contract, or will the issue still be handled as a matter of partial breach in the Court of Claims? What are the implications of “equitable adjustments” negotiations vs. damage claims?

³⁸ See, e.g., *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008).

³⁹ *PG&E v. United States*, 536 F.3d 1282, 1292 (Fed. Cir. 2008).

⁴⁰ *Southern Cal. Edison Co. v. United States*, 93 Fed. Cl. 337, 343 (Fed. Cl. 2010).

⁴¹ See *Energy Northwest v. United States*, 91 Fed. Cl. 531, 542, 547-548 (Fed. Cl. 2010).

If DOE were to begin to accept⁴² spent fuel for disposal at a repository or storage at a facility that is not on the site of the existing reactor, that would likely end any claim for damages for that spent fuel on or after the date of “acceptance.”⁴³ (Potential liabilities for damages for the period prior to the date of acceptance would still remain.)

In *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341-42 (Fed. Cir. 2000), the Federal Circuit discussed the “avoidable delay” provision (Article IX.B) of the Standard Contract (which we infer is what is meant in the question by “equitable adjustments”):

The government relies on the avoidable delays clause of the contract which, as noted, provides:

”In the event of any delay in the delivery, acceptance or transport of [SNF] to or by DOE caused by circumstances within the reasonable control of either the Purchaser or DOE or their respective contractors or suppliers, the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.”

Stressing that this provision covers “any” delay in the “acceptance” of nuclear waste “by” the Department, the government contends that its failure to meet its contractual obligation to begin disposing of such waste by January 1998, constituted a “delay in the delivery, acceptance or transportation” of nuclear waste under that provision. Although this may be

⁴² Section 123 (Title to Material) of the NWPA, 42 U.S.C. § 10143, states that “Delivery, and acceptance by the Secretary, of any high-level radioactive waste or spent nuclear fuel for a repository constructed under this subtitle shall constitute a transfer to the Secretary of title to such waste or spent fuel.” Article I of the Standard Contract defines “delivery” as “the transfer of custody, f.o.b. carrier, of spent nuclear fuel or high-level radioactive waste from Purchaser to DOE at the Purchaser's civilian nuclear power reactor or such other domestic site as may be designated by the Purchaser and approved by DOE.” The phrase “f.o.b. carrier” in the definition of “delivery” implies that the transfer of custody and title occurs when the spent nuclear fuel is placed on-board the transportation carrier. Under Article IV. Section B.2 of the Standard Contract, DOE is responsible for the transportation of the spent fuel or HLW from the reactor sites.

⁴³ As discussed above, damages are calculated based on the difference between the hypothetical costs to the utility if it were not in breach and the actual costs incurred to mitigate DOE’s breach. See, e.g., *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1273 (Fed. Cir. 2008). Once DOE begins to accept spent fuel it would no longer be in breach (as to the spent fuel accepted) and there would no longer be a need to mitigate damages.

a possible interpretation and application of the provision, it is neither plausible nor persuasive, and certainly is not preferred.

The provision is not a general one covering all delays, but a more limited one dealing with specified kinds of delays, namely, those “in the delivery, acceptance or transport” of nuclear waste. These involve particular delays involving individual contractors. They are the kind of delays that routinely may arise during the performance of the contract. For them to arise, however, the parties must have begun performance of their obligations relating to disposal of the nuclear waste.

Yankee's claim against the government is far broader than one for improper delays by the Department in performing its contractual obligations. Yankee contends that the government breached a critical and central obligation of the contract--that it begin disposal of nuclear waste by January 1, 1998. Congress found this objective so important when it promulgated the Act that it took the unusual action of specifying that all the contracts must contain this explicit requirement. The breach involved all the utilities that had signed the contract--the entire nuclear electric industry. The language of the avoidable delays provision of the contract cannot properly be read to cover Yankee's claim.

Further support for this conclusion is found in the limited nature of the relief available under that provision. It provides that in the event of such delay “the charges and schedules specified by this contract will be equitably adjusted to reflect any estimated additional costs incurred by the party not responsible for or contributing to the delay.” Yankee seeks as damages the additional expenses it incurred in continuing to store the nuclear waste past the date on which the Department was obligated to remove it. An equitable adjustment in the contractual “charges and schedules” hardly serves as an appropriate basis for determining such damages. Rather, it appears to be a simple method for making adjustments to reflect delays during the performance of the contract.

Moreover, equitable adjustment of the contractual schedules for removal of the nuclear waste would provide virtually no basis for compensating Yankee for any damages it may have sustained from the Department's failure to perform its contractual obligations. At present there are no schedules containing specific dates for disposing of the waste of particular companies. It is uncertain when they will be adopted and to what extent, if any, they will, or could effectively reflect the Department's breach of the contract.

Indeed, it is unclear whether Yankee's contractual charges could be adjusted under the excusable delays provision. As noted, because

Yankee had ceased to operate its nuclear power plant prior to the effective date of the Act, it was required to pay only a single fee for the electricity it had generated prior to that date, which it did upon execution of the contract. The contract states that, unlike the continuing fees for electricity generated after the effective date of the Act, for which prospective adjustments may be made, the one time fee 'shall not be subject to adjustment' (article VIII.A.2, 4). Perhaps this provision would not bar a retroactive reduction of the fee, but the very question itself suggests the inapplicability of the excusable delay provision to Yankee's claim.

Our discussion of the limited relief available under the excusable delays provision also leads to the conclusion that "complete relief" would not be available for Yankee under that provision, so that Yankee is not precluded from seeking judicial relief by its failure to invoke the contract's disputes clause. Although the government characterizes Yankee's position that complete relief would not be administratively available as speculative, that characterization would more appropriately be applied to the government's contention that such relief would be adequate. The short of the matter is that the narrow specified relief available under the excusable delays provision would fall far short of the relief necessary adequately to compensate Yankee for the damages it alleges it suffered from the government's breach of the contract.

Accordingly, the "equitable adjustments" provision of Article IX.B (the "avoidable delays" subsection) of the Standard Contract would apply only to routine delays that arise after DOE begins accepting spent fuel and HLW. As the *Maine Yankee* opinion states (*id.* at 1342), "An equitable adjustment in the contractual 'charges and schedules' hardly serves as an appropriate basis for determining such damages [*i.e.*, damages for DOE's failure to begin accepting spent fuel and HLW by January 31, 1998]. Rather, it appears to be a simple method for making adjustments to reflect delays during the performance of the contract.

Nevertheless, even after DOE begins to accept spent fuel and HLW, there will still remain claims for damages due to the delay between the beginning acceptance date specified for a utility in the 1987 ACR and the time that DOE begins accepting that utility's spent fuel and HLW. The difference between the two types of claims is that DOE is liable for failure to begin accepting spent fuel and HLW between the utility's initial acceptance date under the 1987 ACR and the time when it accepts a utility's spent fuel and HLW under the case law that has developed in the U.S. Court of Federal Claims discussed herein. (See also, Michael McBride's presentation to the Transportation and Storage Subcommittee on August 19, 2010.) In contrast, routine delays after DOE begins accepting spent fuel and HLW will be dealt by "equitable adjustments" under the "unavoidable delays" clause.

Unlike the damages claims for DOE's failure to accept spent fuel and HLW by January 31, 1998, routine delays perhaps might be "equitably adjusted" for merely by schedule adjustments (if delays do not cause significant costs to be incurred by the party not causing the delay). It is also possible that routine delays could result in determinations of damages due the party not causing the delay if the amount of additional costs incurred is significant. As discussed below, in *Ala. Power*, damages for on-site storage cannot be an offset to a utility's fee payments under the statute as currently construed by the courts. The logic of the *Ala. Power* opinion suggests the same result for routine delays.

ISSUE 3. ON-SITE STORAGE

- a) Would DOE acceptance of title at reactor sites and continued storage there, or at another location under DOE responsibility, constitute performance under the contract?

If DOE accepts title at the reactor sites, but does not incur the costs of continued storage there, DOE would still not be fully performing under the Standard Contract (because full performance would relieve the utility of all of the storage costs, and possibly the security costs, associated with that spent fuel). If, however, we assume that DOE takes title at the reactor site and bears all of the costs of storage and security for that spent fuel (*i.e.*, both fixed and variable costs) at that site, that would likely constitute sufficient "partial performance" under the Standard Contract sufficient to avoid damages at this time.⁴⁴

However, full performance would not be achieved until DOE takes title to the spent fuel and removes it to an off-site location where it is, thereafter, responsible for all of the costs of storage of that spent fuel. (This assumes that, if the off-site storage occurred at some location other than the ultimate geologic repository, the off-site storage of some spent fuel did not prevent removal of other spent fuel from the same reactor; if it did prevent removal of other spent fuel, there may still be a utility claim for damages for the removed fuel, because the utility would incur costs related to the necessity to store other spent fuel on-site because DOE has not yet accepted it for storage or disposal.)

- b) What legislative action would be needed to allow use of the Fund for such storage?

Legislative change to the NWPA that provides explicitly for "on-site storage" as a permissible Nuclear Waste Fund expenditure would be required. As the Eleventh Circuit explained in the *Ala. Power* case, 307 F.3d at 1313-14 (footnotes omitted):

⁴⁴ However, if the failure to physically remove the spent fuel from the reactor site causes the utility to incur other costs, such as the acquisition of additional storage casks or additional land to store other spent fuel, damages might still be due for the spent fuel to which DOE has taken title.

The Act makes a list of things that might be considered acts of 'disposal.' Although the list is not exhaustive, it is instructive of the kinds of activities that might be characterized as 'disposal.' The items in the list all have one thing in common: they entail some sort of advancement or step toward permanent disposal, or else an incidental cost of maintaining a repository. None of them encompass the maintenance of the status quo. To be sure, the D.C. Circuit did give broad meaning to the term 'dispose' in *Indiana Michigan Power Co. v. Dep't of Energy*, 319 U.S. App. D.C. 209, 88 F.3d 1272, 1275 (D.C. Cir. 1996). But the court adhered to the ordinary meaning of that term. *Id.* ('Webster's Third New International Dictionary Unabridged 654 (1961) defines [dispose] as meaning, among other things, "to get [r]id of; throw away; discard.'). Payments for the purpose of interim storage costs simply are not payments for 'disposal.' Indeed, the Department itself once disavowed any authority to utilize the NWF to compensate plant owners for additional storage costs at reactor sites caused by the Department's delay.

(The *Alabama Power* Court's occasional use of the term "interim storage costs" is clear, in context, as meaning "on-site storage costs.")

- c) Would such use [of the Nuclear Waster Fund to permit payment of on-site storage costs] still be subject to challenge as discussed under 4(a) below?

Under cases discussed elsewhere in this memorandum, such as *Ala. Power*, 307 F.3d at 1313 (" Rather, payments the Department makes for on-site storage is the opposite of "disposing" of the waste."), on-site storage costs are not permitted to be paid under the Fund without amendment to Section 302 of the NWPA. Of course, Congress can amend the NWPA in any manner it chooses.

However, if off-site storage can be somehow shown to be associated with "disposal" in a repository, such off-site storage costs perhaps could be paid under the existing authority in Section 302 of the NWPA. Courts may be skeptical of a claim that storage is related to "disposal," given the history of DOE's efforts to claim that on-site storage costs are recoverable. Nevertheless, courts are expected to defer to reasonable interpretations of ambiguous statutes by agencies charged with administering them, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), and the NWPA is at least somewhat ambiguous about what constitutes a permissible "disposal"⁴⁵ cost.

⁴⁵ Section 101 of the NWPA, 42 U.S.C. § 10101, defines the term "disposal" as follows: "the term 'disposal' means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent

ISSUE 4. TO WHAT EXTENT DO CURRENT CONTRACTS CONSTRAIN FUTURE CHANGES TO THE FEE STRUCTURE AND USES OF THE WASTE FUND?

of recovery, whether or not such emplacement permits the recovery of such waste.” Section 302(d)(1) and (4) of the NWPA, 42 U.S.C. §§ 10222(d)(1)-(4), provides that the Secretary may expend money from the Fund for, *inter alia*,

“1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,\2\ retrievable storage facility \3\ or test and evaluation facility constructed under this chapter,” and “any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,\2\ retrievable storage site \3\ or to be used in a test and evaluation facility.

\2\ So in original. The comma probably should not appear.

\3\ So in original. Probably should be followed by a comma.

“4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,\2\ retrievable storage site\3\ or to be used in a test and evaluation facility.

An interpretation by DOE that acceptance by it of spent fuel or HLW for storage at an off-site storage facility, if that were related to “disposal” in a repository (e.g., to provide time for cooling the spent fuel so as to permit it to be disposed of at lower costs at a repository, or to provide an opportunity for “treating” the spent fuel by converting it to HLW so that it would have reduced volume or activity or both, so that it could be “disposed of” at lower cost in the repository), might be entitled to “*Chevron* deference” as a reasonable interpretation of an ambiguous statute. In order for a court to provide such deference to DOE, however, it would likely be critical for DOE to provide a substantial technical basis for the claim that the expenses were “related to” “disposal” in a repository. The holding in *Ala. Power* that DOE cannot use the Fund for reimbursement of on-site storage costs could be a substantial impediment to a DOE finding that there is a technical basis for concluding that on-site storage is somehow related to “disposal.”

- a) Can Congress unilaterally allow use of the fund for purposes that were not authorized by the Nuclear Waste Policy Act when the contracts were signed (e.g., generic research and development on alternative disposal technologies, reprocessing, costs of storage of spent fuel at reactor sites in lieu of acceptance and removal to a federal facility, etc.)? If such expenditures were authorized by subsequent amendments to the law, would current contract holders have grounds to sue for recovery of the expenditures because they were not authorized at the time the contracts were signed?

Congress may amend the NWPA to provide other uses for the Nuclear Waste Fund, because any statute may be amended. As has often been stated, one Congress cannot bind future Congresses, no matter what the area of the law.⁴⁶

However, under the NWPA, DOE was authorized to, and did, enter into binding contracts, which are commercial in nature, to accept spent fuel and HLW for a fee – in other words, a *quid pro quo*. This creates an additional consideration not normally present when Congress considers amending a statute. The Courts that have considered the contractual nature of the relationship between DOE and the utilities have held DOE to its bargain, just as a private entity is held to its contractual bargains.⁴⁷ Therefore, the language of the Standard Contract is critical in answering this question.

The explicit language in Article I, Section 11 of the Standard Contract limits the “costs” for which the fee collected under the Standard Contracts for DOE’s disposal costs to those costs set out in the “Nuclear Waste Policy Act of 1982”. The Standard Contract is unclear as to whether it refers to the NWPA “as amended” or “as may be amended from time to time,” or whether the reference is to the statute as originally enacted in 1982. If the latter construction is problematic, it is because it might rule out any costs incurred by

⁴⁶ See *United States v. Winstar*, 518 U.S. 839, 873 (1996) (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905)) (stating that legislation passed by one Congress is, except in specific contexts not applicable here, “not binding upon any subsequent legislature.”).

⁴⁷ In *Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1276 (D.C. Cir. 1996), the D.C. Circuit stated: “The Department’s treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase ‘not later than January 31, 1998,’ but destroys the *quid pro quo* created by Congress. It does not survive the first step of the *Chevron* analysis. 467 U.S. at 842-43. Under the plain language of the statute, the utilities anticipated paying fees ‘in return for [which] the Secretary’ had a commensurate duty. She was to begin disposing of the high-level radioactive waste or SNF by a day certain. The Secretary now contends that the payment of fees was for nothing. At oral argument, one of the panel compared the government’s position to a Yiddish saying: ‘Here is air; give me money,’ and asked counsel for the Department to distinguish the Secretary’s position. He found no way to do so, nor have we.”

reason of the 1987 amendments to Section 111 of the NWPA, including most costs for Yucca Mountain, which were not specifically authorized until the 1987 amendments (although Yucca Mountain was contemplated as a potential location as of 1982).⁴⁸ Moreover, the NWPA specifically contemplated the expansion of the purposes for which disbursement from the Nuclear Waste Fund could be made where it provided that no amounts could be expended for construction or expansion of any facility unless “expressly authorized by this or subsequent legislation.”⁴⁹

If Congress were to amend the NWPA to provide other uses for the NWF, current contract holders might try to sue for recovery of the additional expenditures not permitted under the 1982 NWPA because they were not authorized at the time the Standard Contracts were signed in 1983. However, it is not clear whether this argument will prevail.

- b) Could DOE renegotiate contracts with individual utilities to adjust their fees to reflect savings in costs of management and disposal (e.g. lower net fees for utilities that deliver high-level waste instead of spent fuel, or that provide their own storage pending disposal instead of delivering it to a federal interim storage facility)? If the law were changed to allow such rebates (if legislation were needed), would other utilities have grounds to object?

1) Alternatives Under Existing Law.

Under Section 302 of the NWPA, 42 U.S.C. § 10222, the fee (other than for spent fuel generated before April 7, 1983) is a single fee determined by the Secretary of Energy and applicable to all utilities under the Standard Contract.⁵⁰ However, so long as the

⁴⁸ According to a rule of legislative drafting, a reference to an original act is also a reference to its future amendments. See *Filson & Strokof, The Legislative Drafter's Desk Reference (2d Ed.)*, § 24.5 at p. 332 (“The name of an Act invariably remains the same throughout its life, and it speaks as of the time it is being read or applied, no matter how many times it has been amended since its original enactment. It is therefore never necessary (and can be misleading) to attach the phrase ‘as amended’ when referring to an existing law [footnote omitted], and the practice should be avoided.”).

⁴⁹ Section 302(d) of the NWPA, 42 U.S.C. § 10222.

⁵⁰ Section 302(a)(2) of the NWPA states: “For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after the date of enactment of this Act, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.” The fee is incorporated into the Standard Contract at 10 C.F.R. § 961.11 Art. VII. Section 302(a)(4) states, in pertinent part:

Standard Contract continued to charge that fee, we believe that the existing contracts with utilities could be renegotiated to permit refunds if the utility is taking action to reduce DOE's disposal costs. However, we do not believe that DOE can negotiate an amendment to a Standard Contract that reimburses a utility for its on-site storage costs.

In *Ala. Power*, 317 F.3d at 1313-14, the Eleventh Circuit held that the NWF could not be used to pay (even in a settlement with Exelon) for on-site storage costs. The *Ala. Power* Court explicitly held that a utility providing its "own storage pending disposal instead of delivering it to a federal interim storage facility" cannot be reimbursed out of the NWF under current law, because on-site storage is the opposite of disposal. *Id.* at 1313 ("Rather, payments the Department makes for on-site storage is the opposite of "disposing" of the waste.) Under this scenario, a utility would not be reducing DOE's disposal costs, because presumably the same spent fuel would still eventually have to be disposed of at a repository. With respect to the part of the question that is directed to a utility's on-site storage costs, the most likely scenario is that the utility will have sued DOE for its damages for the incurrence of those costs. Any damages owed a utility for its unavoidable costs due to DOE's partial breach must be paid under current law out of the DOJ's Judgment Fund. *Id.*

In contrast, the lower costs incurred by DOE (in the first part of the question) because of the hypothetical actions of a particular utility to save DOE expense (such as "deliver[ing] high-level waste instead of spent fuel") might be recoverable from the NWF as related to "disposal" and therefore a permissible NWF expense. (For purposes of this answer, and given the terms of the question, we assume that, as a technical matter, conversion of spent fuel to HLW would reduce DOE's disposal costs.)

Section 136(d)⁵¹ of the NWPA provides that the NWF may be used only for:

The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) of this section. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d) of this section, the Secretary shall propose an adjustment to the fee to insure full cost recovery.

Since 1983, DOE has not altered the 1 mil/kWh fee. The Eleventh Circuit observed in *Ala. Power*, 307 F.3d at 1303-04: "No such change has ever been proposed by the Secretary, prompting the D.C. Circuit to observe that the Secretary, 'not unlike Goldilocks, [always finds] that the statutory fee is not too high, and not too low, but just right.' *National Ass'n of Reg. Util. Commissioners v. DOE*, 851 F.2d 1424, 1426 (D.C. Cir. 1988)."

⁵¹ 42 U.S.C. § 10222(d).

d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e) of this section, only for purposes of radioactive waste disposal activities under subchapters I and II of this chapter, including--

(1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,² retrievable storage facility ³ or test and evaluation facility constructed under this chapter;

(2) the conducting of nongeneric research, development, and demonstration activities under this chapter;

(3) the administrative cost of the radioactive waste disposal program;

(4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,² retrievable storage site³ or to be used in a test and evaluation facility;

(5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,² retrievable storage site ³ or a test and evaluation facility site and necessary or incident to such repository, monitored,² retrievable storage facility ³ or test and evaluation facility; and

(6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

² So in original. The comma probably should not appear.

³ So in original. Probably should be followed by a comma.”

No amount may be expended by the Secretary under this subchapter ⁴ for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

Whether a utility's actions in converting spent fuel to HLW "for purposes of radioactive waste disposal activities" may be refunded under an amendment to a Standard Contract would depend on whether they could be considered to be "costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository..." under Section 136(d)(4) of the NWPA, *supra*. It is not entirely clear to us that conversion of spent fuel to HLW by a utility⁵² would fall under that definition (*i.e.*, as "treating" of "spent nuclear fuel or high-level radioactive waste to be disposed of in a repository"), but if DOE were to so conclude, its interpretation would likely be upheld under the "second prong" of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) as a reasonable interpretation of an ambiguous statute by the agency charged with administering it.⁵³

⁵² DOE could categorize the utility as its "contractor" for the purpose of converting the spent fuel to HLW. Under Art. IV, Section B.3 of the Standard Contract, "DOE may fulfill any of its obligations, or take any action, under this contract either directly or through contractors."

⁵³ Section 111(a)(5) of the NWPA, 42 U.S.C. § 10131(a)(5), provides that "generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with the provisions of this chapter...." *Northern States Power Co. v. DOE*, 128 F.3d 754, 756 (D.C. Cir. 1997)("In the NWPA, Congress, confronting the "national problem" posed by the accumulation of spent nuclear fuel and radioactive waste produced by various domestic sources, 42 U.S.C. § 10131(a)(2), created a scheme whereby the federal government would have the responsibility to provide for the permanent disposal of the SNF, and the costs of such disposal would be borne by the owners and generators of the waste and spent fuel. 42 U.S.C. § 10131(a)(4). The plan provided that the owners and generators of the SNF would have the primary responsibility to provide and pay for its interim storage until the Secretary of Energy accepts the material "in accordance with the provisions of this chapter." 42 U.S.C. § 10131(a)(5).").

The third "Whereas" clause of the Standard Contract provides that "Whereas, all costs associated with the preparation, transportation, and the disposal of spent nuclear fuel and high-level radioactive waste from civilian nuclear power reactors shall be borne by the owners and generators of such fuel and waste." If DOE were to amend a particular Standard Contract with a utility to provide a refund for conversion of spent fuel to HLW, it would have to determine that it could provide such a refund consistent with that Clause. (DOE may decide not to alter that "Whereas" clause in an amended contract, because the Standard Contract is intended to be generic.)

We believe that DOE may be able to construe the "Whereas" clause (without amendment) and Section 111 to permit it to provide a refund (or credit) for conversion of

However, if DOE could provide such a refund, we believe it is clear that the maximum refund to the utility would be the amount of DOE's disposal-cost savings, rather than the amount of the utility's incurred costs, so as to avoid a conflict (or at least a tension) with the *Alabama Power* Court's holding that the NWF may not be used to reimburse utilities for their damages. Note that, under this scenario, the hypothetical utility is reducing disposal costs for DOE, rather than incurring on-site storage costs unrelated to DOE's disposal costs. Therefore, we assume, other utilities would not have their fee increased to pay for the first utility's actions if the refund to the utility is limited by DOE's cost-savings. We therefore assume that the other utilities would not have a claim, because they would have no basis to object to a payment limited by the amount of DOE's disposal-cost savings.

2) Potential Legislative Changes.

Question: Could Utilities Object If Rebates Were Permitted for Costs of Conversion of Spent Fuel to HLW?

Finally, to answer the question "If the law were changed to allow such rebates (if legislation were needed), would other utilities have grounds to object?," the answer would be "no," in the case of a refund for converting spent fuel to HLW (so long as the refund is limited to DOE's cost savings, as discussed *supra*). The reason is because the refund for converting spent fuel to HLW would not increase DOE's overall costs so as to require reimbursement to the NWF by other utilities that did not receive such a refund, and therefore would not violate the holding in *Ala. Power*, discussed *supra*.

Question: Could Utilities Object If Rebates Were Permitted for On-Site Storage Costs?

In contrast, we believe the answer is "not clear," in the case of a refund of on-site storage costs, because it would depend on how Congress amended the NFWA. The reason that the utilities might be able to succeed in objecting to refunds for the on-site storage costs of other utilities was well-summarized by the *Ala. Power* Court, 307 F.3d at 1314, which stated:

Our conclusion is further reinforced by common sense and a practical understanding of <u>the regulatory scheme Congress envisioned</u> . If the

spent fuel to HLW under an amended Standard Contract, because the conversion is arguably not "preparation, transportation, and disposal of the spent fuel," but rather may be considered "treating" of the spent fuel as that term is used in Section 10222(d), quoted in text *supra*. Therefore, DOE could construe such conversion to be a permissible expenditure from the NWF under Section 10222(d) rather than an expense statutorily required to be borne by the utilities.

Department could pay for its breach out of a fund paid for by the utilities, the government would never be liable. Instead, the Department would keep adding these liabilities as "costs" that would justify future fee increases, indirectly forcing the utilities to bear the costs of the Department's breach. This is certainly not what Congress had in mind when it decided to empower the Department to negotiate contracts rather than imposing top-down regulations. Moreover, those utilities who neither settle nor litigate their claims would end up paying greater fees to cover the costs of other utilities. This thwarts the quid pro quo arrangement in which each utility roughly pays the costs of disposing of its waste and no more (using kilowatt-hours as a proxy for waste production). By establishing a contract and a quid pro quo arrangement, the regulatory scheme contemplates that the ultimate burden of the government's breach to fall on the government, not other utilities." [Emphases added.]

In *Ala. Power*, the Court relied both on the "regulatory scheme Congress envisioned" and "*quid pro quo* arrangement" under the Standard Contract. The government is bound by its contracts, but Congress is free to change the underlying regulatory scheme, and may do so without subjecting the Government to liability for damages unless the regulatory change constitutes a breach of the contract. The question here is whether a change in the regulatory scheme (to provide rebates for on-site storage) would constitute a contract breach. As we noted above (at pp. 26-31), it is unclear whether either expansion by Congress of the purposes for which the Nuclear Waste Fund may be used, or provision of a credit against the nuclear waste fee, would be a breach of the Standard Contract. The answer, in our view, will be dependent on how the rebate is structured and how it fits into a larger redesign of the NWPA. For example, a redesign could allow contract holders to elect (1) to participate in a new comprehensive storage and disposal regime, with its own separate fee structure, or (2) to stay with the current system with its current fee structure (and litigation burden).⁵⁴ That type of redesign might fare much better in the courts than a simple expansion of the allowable expenditures from the Nuclear Waste Fund.

Thus, whether Congress can authorize rebates from the Nuclear Waste Fund or a credit against fees otherwise due, to utilities that provide on-site storage, likely would depend on the precise manner in which Congress amended the NWPA. Any definitive judgment on this question must await a specific proposal to restructure the Nuclear Waste Fund.

⁵⁴ Under the type of arrangement outlined here, interim storage and disposal facilities would be constructed and operated under the new NWPA regime. Contract holders electing to stay under the old NWPA regime would essentially be held harmless. They would be responsible for their own storage (with a contract damages remedy against DOE). Their share of the balance in the current Nuclear Waste Fund and future fees they pay in accordance with current law would be used to pay for their space for their spent nuclear fuel in the repository ultimately constructed.